Supreme Court, U.S.
FILED

021190 FEB 11 2003

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No. _____

In The

Supreme Court of the United States

Paul Cole,

Petitioner,

v.

Builders Square and Cuprum, S.A. de C.V.,

Respondent.

On Petition for A Writ of Certiorari
to The United States Court of Appeals
for The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of Oregon has defined the evidence sufficient to raise a jury question on state claim for punitive damages as "any evidence." If the claim is removed to federal court, however, that evidence is no longer sufficient. To establish a *prima facie* case in federal court, the same claim requires "clear and convincing" evidence.

The question presented is:

Whether a federal court sitting in diversity should follow the state rule defining the evidence sufficient to raise a jury question as to whether the state-created claim was established.

PARTIES TO THE PROCEEDING

Petitioner Paul Cole is an individual and was the plaintiff and appellant in the proceedings below.

Respondent Cuprum is a Mexican company and was the Defendant and the Respondent below.

Builders Square was a defendant in the District Court but shortly after service declared bankruptcy and was dismissed from the proceedings.

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Linda S. Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 Am.J. Trial Advoc. 433 (1987) 25

Olin G. Wellborn, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 Tex. L. Rev. 371 at 401-02 & n.177 (1977) 14

Jeffrey W. Stempel, *A Distored Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.J. 95 (1988) 25

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Ninth Circuit (App. 1a-6a) is not reported in the Federal Reporter but can be found at 48 Fed. Appx. 684 (2002). The opinions of the District Court (App. 7a-34a) are unreported. The order of the Ninth Circuit denying the petition for rehearing (App. 35a) is unreported.

JURISDICTION

The judgement of the Ninth Circuit was entered on October 11, 2002. A timely petition for rehearing was denied on November 14, 2002. This jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent statutes and constitutional provisions are reproduced in the Appendix. The United States constitutional provision involved is the Seventh Amendment (App. 32a). The Oregon constitutional provisions involved are Article I §17 and Amended Article VII §3 (App. 32a). The federal statutes and rules involved are 28 U.S.C. § 2072 (App. 33a.) and Fed. Civ. R. Proc. 56 (App. 34a). The Oregon statutes involved are O.R.S. 18.537 (1) (App. 35a) and 18.540 (1) (App. 36a).

STATEMENT OF THE CASE

This product liability action presents an *Erie* choice of law question as to whether, in opposing a summary judgment motion, plaintiffs seeking punitive damages must meet the more onerous evidentiary burden of persuasion under federal law, or the less stringent evidentiary burden under state law.

The action was originally filed in state court then removed to federal court. The district court's exercise of jurisdiction is based solely upon 28 U.S.C. § 1332, diversity of citizenship.

The case arises out of injuries which petitioner Cole

sustained when he attempted to climb down from a rooftop using a Model 534 extension ladder designed and manufactured by respondent Cuprum Ladder. When Cole stepped onto the ladder, its "rung lock" failed. The ladder "telescoped" downward, and Cole was severely injured when he fell and "impaled himself" on a nearby garden post.

Cuprum designed and began manufacturing the rung lock for its Model 534 extension ladder in 1989.[1] Even though the company routinely purges records of claims against it, Cole uncovered three claims that resulted in lawsuits – one brought in 1992 ("*Watkins*")[2] another brought in 1994 ("*Bazan*")[3], and yet another brought in 1996 ("*Jehnsen*").[4] Each suit alleged serious injuries caused by the very same design defect that caused Cole's ladder to fail.

Despite all these claims, Cuprum failed to take any action to correct its rung lock design or to warn consumers of the danger. Instead it continued to manufacture and sell ladders it knew were defective.

In his suit against Cuprum, Cole sought punitive damages to deter Cuprum and other manufacturers from ignoring such hazards. Cuprum moved for, and obtained, a summary

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[1] ER33 at 236.

[2] *Watkins v. Cuprum International, Inc. and Alamo Iron Works, Inc.*, Brazos County District Court Cause No. 36.987-85 (Texas 1992). ER6 at 65-66.

[3] *Domingo Bazan v. Cuprum, S.A. DE C.V., Davidson Ladders, Inc. and Builders Square, Inc.*, Harris County District Court Cause No. 96-32221 (Texas 1994). ER6 at 65-66.

[4] *Jehnsen v. Builders Square, Inc., Davidson Ladders, Inc. and Cuprum, S.A. DE C.V.*, Bay County Circuit Court Case No. 96-3148-NP-B (Michigan 1996). ER6 at 65-66.

judgment of dismissal against Cole's punitive damage claim.[5] It is that dismissal that gives rise to the instant petition.

Cole provides the following background.

A. Cole's *Prima Facie* Evidence

Under Oregon law, to establish a *prima facie* case for punitive damages in a product liability case, Cole had to establish the following elements:

(1) that Cuprum's product was unreasonably dangerous, and;

(2) that it either knew, or should have known, of the product's dangerous propensity.[6]

To meet the first element – unreasonable danger – Cole presented the sworn opinions of three licensed engineers, each attesting that Cuprum's rung lock design was both defective and unreasonably dangerous.[7]

To meet the second element – notice of the danger – Cole presented evidence of the three prior above-referenced lawsuits.

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[5] ER3 at 5.

[6] *See Oberg v. Honda Motor Co.*, 320 Or. 544, 553, 888 P.2d 8 (1995). *Oberg* held that evidence that the manufacturer had prior notice that its product was likely to cause serious personal injury or death was sufficient to support an award of punitive damages:

> "Evidence was presented that defendants actually knew, or should have known, for many years before developing the ATV model that injured plaintiff, that their ATVs were highly likely to cause serious personal injury or death."

See also ORS 18.537.

[7] Excerpts from engineers Williams, Paul, and Cronrath's Rule 26(b) disclosures. ER6 at 42-44, 45-47, and 48-50, respectfully.

Each named Cuprum as a defendant; each involved the same model ladder and defective rung lock; and each alleged serious injuries resulting from the same false locking defect.

B. The Magistrate Correctly Framed the Issue as Turning on Prior Notice

The Magistrate who heard the motion,[8] properly acknowledged that for purposes of summary judgment she would accept as true the opinions of Cole's three experts attesting to the ladder's dangerousness.[9] She then properly framed the issue under Oregon law as turning on whether Cuprum had prior notice of "problems with the Model 534 rung locks."[10]

C. The Magistrate Erroneously Applied a "Clear and Convincing" Standard Instead of Oregon's "Any Evidence" Standard

In determining the sufficiency of the prior notice evidence, the Magistrate applied the more burdensome federal standard instead of Oregon's less stringent standard. The two standards are significantly different.

Under the federal standard, in ruling on a motion for summary judgment, the judge must evaluate the evidence presented through the "prism of the substantive evidentiary burden,"[11] which for an Oregon punitive damage claim is "clear

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[8] The district court trial judge adopted the reasoning of the Magistrate with little discussion. App. 29a-30a.

[9] App. 14a.

[10] App. 17a.

[11] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

and convincing."[12] In other words, under the federal standard, the appropriate summary judgment question is whether a reasonable jury could find that Cole presented "clear and convincing" evidence that Cuprum had prior notice of the ladder's problems.[13]

In stark contrast, Oregon law has defined the evidence sufficient to raise a jury question as to a punitive damage claim as "any evidence." Moreover, that standard applies whenever the sufficiency of a *prima facie* case is called into question, such as in a directed verdict motion or a summary judgment motion.[14] This includes claims that require a heightened burden of proof to recover, such as a punitive damage claim where the burden of proof required is clear and convincing evidence. *Bolt v. Influence, Inc.*, 333 Or. 572, 577, 43 P.3d 425 (2002). In fact, the Oregon Supreme Court has stated that " the 'clear and convincing' burden of proof ..., which refers to the ultimate burden of proof that a plaintiff must meet to recover punitive damages, has no relation to the burden associated with the "directed verdict" standard used to review the sufficiency of evidence ...." A plaintiff satisfies the latter by producing some evidence in support of a *prima facie* case." *Id.* at 579-80.[15]

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[12] ORS 18.537(1).

[13] *Anderson*, 477 U.S. at 256-55.

[14] *Jones v. General Motors Corp.*, 325 Or. 404, 420, 939 P.2d 608 (1997) (Court held that the summary judgment standard mirrors the directed verdict standard, which is "any evidence.").

[15] Although the issue in *Bolt v. Influence, Inc.*, 333 Or. 572, 577, 43 P.3d 425 (2002), was whether the plaintiff was entitled to amend his complaint to add a punitive damage claim, in order to do so under Oregon law, the plaintiff must submit evidence necessary to establish a punitive damage *prima facie* case.

Thus under Oregon law, if Cole presents "any evidence" that Cuprum had prior notice of the ladder's problems, then he creates a triable issue as to punitive damages. *Id.* at 579.

But because the Magistrate used the federal standard, she had to decide whether Cole produced "clear and convincing" prior notice evidence. The burden of persuasion, by definition, "is the duty of establishing the truth of a given proposition or issue by such a *quantum* of evidence as the law demands."[16] Thus viewing the evidence presented through the "prism of the substantive evidentiary burden" required her to consider and *weigh* evidence contradicting what Cole had presented in support of his *prima facie* case[17] – an approach that Oregon state law specifically rejects.

This was apparent when the Magistrate considered Cole's evidence of the 1992 products liability suit that Watkins filed against Cuprum to show that the company had prior notice of its ladder's dangerous propensities. First, the Magistrate considered testimony from Cuprum's claims handler, Mr. Cooke, that contradicted Coles' evidence. Mr. Cooke testified that the jury returned a defense verdict in *Watkins* and that the reason it did so was because the jury found the lock did not malfunction. She then found his testimony more persuasive than Cole's evidence. Thus she concluded that the *Watkins*' suit could not place Cuprum on notice of the problem:

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[16] *Bolt v. Influence, Inc.*, 333 Or 579.

[17] The trial judge can only consider evidence that could be a complete defense, such as an exemption or immunity:

> "[A] court considers such evidence as it would in ruling on a motion for a directed verdict – that is, to the extent that it establishes that a defendant is immune or enjoys some other exemption or complete defense to a punitive damages award." *Bolt,* 333 Or. at 582.

> *Watkins* resulted in a jury verdict for Cuprum. Cooke's testimony reveals his corresponding reasonable belief that the jury had completely rejected the plaintiff's allegation that the ladder had mis-locked. *See* Cooke Depo, p. 89 ("it was proved that it was not a telescoping case"). Thus, absent any contrary evidence, Cole cannot rely on *Watkins* to show that Cuprum had notice of a design defect in the rung locks of the model 534 ladder.[18]

In a similar manner, the Magistrate held that the other two lawsuits, *Bazan* and *Jehnsen*, also failed to impart any prior notice to Cuprum. In effect, she ruled that for a prior lawsuit to constitute "clear and convincing" evidence of notice, evidence of a claim alone is not enough, the claim must have resulted in a finding that the alleged product was, in fact, defective:

> [T]he two lawsuits filed in 1996, *Bazan* and *Jehnsen*, though factually very similar to the present suit, provide little hard evidence of culpable conduct. A lawsuit is merely a claim which may or may not have merit. This court has no information as to the outcome in those cases. Did the case go to trial, and, if so, who won? Did Cuprum believe that the lawsuits were meritless, yet settle them to avoid the difficulties and expense of litigation? Without more, this court is hard-pressed to consider the two lawsuits as evidence of Cuprum's knowledge of a defect.[19]

Under Oregon law, imposing such a heavy burden and considering opposing evidence would not have been appropriate. The Oregon Supreme Court has explained that

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[18] App. 23a - 24a.

[19] App. 24a.

> . . . in deciding whether to submit case to jury, 'we are unconcerned with the quantum of evidence. Our concern is only with the existence of evidence which, if accepted as being true by the trier of fact, would establish the fact in question.

Bolt, 333 Or. at 580.

Oregon law recognizes that lawsuit complaints alleging a dangerous condition or defect unquestionably serves as notice of the problem.[20] Under Oregon law, evidence of the three lawsuits, would have established that Cuprum had prior notice of the defect.

Despite all of Cole's notice evidence, the Magistrate's application of the federal standard resulted in a dismissal of Cole's punitive damages claim:

> Here, no reasonable jury could find that Cuprum has had notice, or should have had notice, of any defect in the rung lock mechanism of the Model 534 extension ladder.[21]

Had Oregon's sufficiency of evidence standard been used, the outcome surely would have been different.

D. The Ninth Circuit's Opinion

The Ninth Circuit affirmed the district court's use of the federal "clear and convincing" standard for the Oregon claim:

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[20] *See, e.g., Oberg v. Honda Motor Co.*, 320 Or. 544, 553, 888 P.2d 8 (1995); *Waddill v. Anchor Hocking, Inc.*, 149 Or. App. 464, 468, 944 P.2d 957 (1997); *Lakin v. Senco Products,* 144 Or. App. 52, 61, 62-63, 925 P.2d 107 (1996), *aff'd.*, 329 Or. 62, 987 P.2d 463 (court adopted reasons of lower court for affirming admission of prior acts. *Id.* at 84), *mod. on recons. on unrelated grounds*, 329 Or. 369, 987 P.2d 476 (1999).

[21] App. 27a.

> Federal law applies to the question of the quantum of proof necessary to sustain a cause of action. The federal standard requires the court to view the evidence presented through the prism of the substantive evidentiary burden, which is precisely what the district court did. Because we conclude that the district court properly applied the relevant standard, we affirm on this issue.[22]

REASONS FOR GRANTING THE PETITION

A. Introduction

There are three reasons why this court should grant the petition.

1. To resolve a conflict between state and federal law

The District Court and Ninth Circuit's use of the "clear and convincing" evidentiary standard conflicts with Oregon's substantive law. The latter provides that "any evidence" is sufficient to create a jury question. *Erie* and *Byrd* both teach that removing a case to federal court involves exchanging courtrooms, not laws. Thus, a plaintiff's *prima facie* case should not disappear merely because it is removed to federal court. To allow two different standards to apply to the same claim within the State, however, will result in just that. This inequitable administration of laws will surely encourage parties to forum shop, a practice that this Court has long sought to avoid.

2. To uphold this court's precedent

The Ninth Circuit's ruling that "[f]ederal law applies to the 'question of the quantum of proof necessary to sustain a cause

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[22] App. 3a.

of action'"[23] conflicts with this Court's decisions in *Stoner v. New York Life Insurance Co.*, 311 U.S. 464 (1940) and *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958). In *Byrd,* this Court relied upon *Stoner* for the proposition "that the federal court should follow the state rule defining the evidence sufficient to raise a jury question whether the state-created right was established." *Byrd* at 540, n.15.

3. To resolve conflict and doubt among the circuits

Although this Court's opinion in *Byrd* and *Stoner* indicate that the federal court should follow the state law defining the evidence sufficient to raise a jury question, the federal courts of appeals are divided. Some hold that the sufficiency of evidence is a matter of state law. Some hold it is a matter of federal law. And some declare the issue is still unresolved. The instant case is an excellent opportunity for the Court to reaffirm its holding in *Byrd* – that the amount of evidence sufficient to create a jury issue on a state claim in federal court is "intended to be bound up with the definition of the rights and obligations of the parties" which make it "clearly substantive" and applicable in federal court. *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U.S. 525, 535-36 (1958).

B. Argument in Support of Granting Petition

Erie holds that "except in matters governed by the Federal Constitution or by Acts of Congress," the Rules of Decision Act, 28 U.S.C. § 1652,[24] requires federal courts sitting in

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[23] App. 3a.

[24] The Rules of Decision Act, now contained in 28 U.S.C. § 1652, reads:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil

diversity to apply state substantive law and federal procedural law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). "In essence, the intent of *Erie* was to insure that, in all cases where a federal court is exercising jurisdiction solely because of [diversity], the outcome of the litigation in the federal court should be substantially the same ... as it would be if tried in a State court." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). The twin aims of *Erie* are to avoid the "inequitable administration of the laws" and discourage "forum shopping." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

Whether the state law is "substantive" or "procedural" is not always readily apparent, however. In cases where it is not clear, the state law will be considered "substantive" if its application could affect the outcome of the litigation to such a degree that litigants will take that into account when choosing the forum – state or federal – in which to litigate. *Guaranty Trust Co.*, 326 U.S. 99 (1945).

State substantive laws that conflict with the Seventh Amendment must be examined in light of the competing federal interests. The Seventh Amendment governs proceedings in federal court, and includes such federal interests as the right to trial by jury. If the state law conflicts with the Seventh Amendment, the state law will apply in federal court only if the state interest outweighs the countervailing federal interests. *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U.S. 525, 537 (1958).

The *Erie* Doctrine does not apply, however, to Federal Rules of Procedure that "control the issue'" because they are promulgated by the Supreme Court under an Act of Congress, the Rules Enabling Act, 28 U.S.C. § 2072. The Act's only

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actions in the courts of the United States, in cases where they apply."

limitation is that the federal rule "shall not abridge, enlarge or modify any substantive right." *Id.* Saving that limitation, if the federal rule is "'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court, thereby leaving no room for the operation of that law," the federal rule controls. *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987).

Thus, whether a federal court sitting in diversity should apply the Oregon "any evidence" standard or the federal "clear and convincing" standard involves a three-step inquiry. The first step is to determine whether Rule 56 defines the evidentiary burden required to establish a *prima facie* case for state claims, and if so, does it require the *prima facie* burden vary in accordance with the burden of proof required to prevail on the particular claim at issue. If the answers to both are "yes," then Rule 56 controls and the lower courts properly applied the federal "clear and convincing" standard in this case. However, if Rule 56 does not define the *prima facie* burden for state claims, then the second step is to determine whether Oregon's definition of a *prima facie* case is considered "substantive" law. If it is considered "procedural," then the federal standard applies. However, if it is considered "substantive," then the third step is to determine whether applying Oregon's definition of a *prima facie* case conflicts with the federal interests contained in the Seventh Amendment, and if so, does Oregon's interest outweigh the countervailing federal interests. If it does, then Oregon's "any evidence" definition of a *prima facie* case applies in federal court.

1. Rule 56 does not pre-empt Oregon's less stringent sufficiency of evidence standard

a. Federal rules are construed narrowly so as to avoid conflict with state interests

Given the state interests recognized in *Erie* and the Rules

of Decision Act, this Court has long held that federal statutes and federal rules should be construed, if at all possible, to avoid a conflict with state interests.[25] This practice is in keeping with the federalist principle that Acts of Congress are to be construed "in light of the presumption against the pre-emption of state police power regulations." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992); and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Moreover, in order for the political safeguards of federalism to function effectively,[26] the States must be put on notice about how much of their law is being removed by Congress. "Mere silence ... cannot suffice to establish a clear and manifest purpose to pre-empt local authority." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607 (1991).[27]

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[25] *See, e.g., Hanna v. Plumer*, 380 U.S. 460, 470 (1965) (finding an "unavoidable" clash given federal rule of "unmistakable clarity"); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 (1980) (avoiding construction that, under Fed. R. Civ. P. 3, filing of complaint tolls statute of limitations for state-law actions, where state law requires effectuation of service); and comparing *West v. Conrail*, 481 U.S. 35, 39 & n.4 (1987) (holding that under Fed. R. Civ. P. 3, filing of complaint tolls statute of limitations for federal-law causes of action, and explaining the opposite result in *Walker* as flowing from "respect for the State's substantive decision that actual service is a component of the policies underlying the statute of limitations") (citing *Walker*, 446 U.S. at 752); *see also Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 200-02 (1956) (construing federal arbitration statute narrowly to avoid conflict with state law); *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943) (construing Fed. R. Civ. P. 8(c) narrowly to avoid conflict with state law in diversity case).

[26] *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) and *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

[27] Congress was so meticulous in safeguarding federalism values that "[a] study of the enacted Rules reveals little remaining that could plausibly have been attacked, were it subject to the Enabling Act's limitation, as modifying

If the federal rule's language itself does not specifically address the state matter, but is merely judicially interpreted to do so, then the judge-made rule does not enjoy the same status as a congressional enactment under the Federal Rules Enabling Act and *Hanna*. *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. at 27 n.6 (stating that "if application of federal judge-made law would disserve [Erie's] two policies, the district court should apply state law"). *See also Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996) (stating that the "shock the conscience" standard used for Rule 59 motions was a "judge-made formulation in responding to excessiveness attacks on jury verdicts" (*id.* at 422); thus, whether New York State rule applied was not governed by the Rules Enabling Act but by the principles of *Erie*. *Id.* at 426-29.).

In summary, when a rule governing the administration of the federal courts is not expressly prescribed by one of the Federal Rules of Civil Procedure, a Congressional Act, or the Constitution – but is instead a judge-made "procedural" law – a court is not bound by *Hanna*. The Court must resort to the *Erie* doctrine to determine whether the state law applies in federal court.

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state substantive rights in diversity cases," confirming that Congress was "deeply concerned with preventing the undercutting of state substantive policy." Olin G. Wellborn, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 Tex. L. Rev. 371 at 401-02 & n.177 (1977). That inference follows especially in the context of this products liability suit, for Congress has traditionally been extremely reluctant to interfere with state law in tort cases. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); see generally Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 Georgetown L.J. 1, 30-31 (1991).

b. Rule 56 neither defines the evidentiary burden required to establish a *prima facie* case for a state claim, nor incorporates the claim's required burden of persuasion

Here, the language of Rule 56 does not speak to the evidentiary burden required to establish a *prima facie* case, let alone incorporate any applicable burden of persuasion. Rather, its sole criteria for granting a summary judgment motion is that there is no "genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).[28]

Although Rule 56 does not address the matter, in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Court created a judge-made rule requiring a trial judge to consider the ultimate burden of persuasion, such as the "clear and convincing" standard, when evaluating the evidence for a motion for summary judgment.

Anderson, however, is clearly inapposite here. First, it presented the narrow issue of "whether the clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which *New York Times* applies." *Id.* at 244. Thus, there were constitutional implications in *Anderson* not present in this case.[29]

More importantly, in *Anderson* there was no countervailing

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[28] App. 34a.

[29] When a matter is one of public concern, the First Amendment affords special protections and a heightened burden applies. *See, e.g., Philadelphia Newspapers, Inc. v. Hepp*, 475 U.S. 767 (1986).

state law that might apply, as there is here.[30] *Erie*, in short, was not an issue in *Anderson*.

In summary, because the language of Rule 56 does not define the evidentiary burden required to sustain a *prima facie* case for a state claim, nor does it incorporate any applicable burden of persuasion, the inquiry must advance to the next step: determining whether Oregon's sufficiency of evidence definition constitutes substantive law.

2. Oregon's rule defining the evidence sufficient to raise a jury question for establishing a product liability punitive damage claim is "substantive"

Once a court determines that the state law does not conflict with a Federal Rule of Civil Procedure, it must then determine whether the principles underlying the *Erie* doctrine require enforcement of the state law in federal court.

a. State laws or rules that define the elements of a claim and establish burdens of proof are "clearly substantive"

Federal courts sitting in diversity must enforce state rules that are clearly substantive. This Court defined substantive rules as those that are "intended to be bound up with the definition of the rights and obligations of the parties." *Byrd*, 356 U.S. at 536.

State rules that define the elements of a cause of action, affirmative defenses, presumptions, and burdens of proof, together with rules that create or preclude liability, are so obviously substantive that their application in diversity actions

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[30] Many have questioned *Anderson's* wisdom of incorporating a heightened burden of persuasion into determining whether evidence is sufficient as a matter of law. For further discussion see note 40 *infra*.

is required. *See, e.g.,Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 20-21 (2000) ("[W]e have long held the burden of proof to be a 'substantive' aspect of a claim."); *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446-47 (1959) (federal court must apply state law presumptions and burdens of proof).

The Court's rationale for having "long held the burden of proof to be a 'substantive' aspect of a claim [is that] the burden of proof is an essential element of the claim itself; one who asserts a claim is entitled to the burden of proof that normally comes with it." *Raleigh*, 530 U.S. at 20-21 (2000). *Accord American Dredging Co. v. Miller*, 510 U.S. 443, 454 (1994) ("[T]he right of the plaintiff to be free of the burden of proof 'inhered in his cause of action,' was a part of the very substance of his claim and cannot be considered a mere incident of a form of procedure.").

The evidence necessary to establish a claim is also essential to the claim itself, and a "substantive" aspect of the claim. *Stoner v. New York Life Insurance Co.*, 311 U.S. 464 (1940).[31] Similarly, state rules defining that quantum of evidence are considered "substantive." *Id.*

Thus if Oregon defines the amount of evidence sufficient to create a jury question on a punitive damage claim as "any evidence," then that standard should apply in federal court.

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[31] In *Byrd*, the Court interpreted *Stoner* as having held "that the federal court should follow the state rule defining the evidence sufficient to raise a jury question whether the state-created right was established." *Byrd*, 356 U.S. at 540 n.15.

b. Even if Oregon's rule defining the evidence sufficient to raise a jury question for punitive damages is not "clearly substantive," the law meets the *Erie* definition of "substantive"

Even if Oregon's definition of a punitive damage *prima facie* case is not "clearly substantive,"[32] it still meets the *Erie* definition of "substantive."

(1). The *Erie* test

In those instances where a state rule is not "clearly substantive," *Erie* requires that the court ask whether non-application of the rule will change the litigants' behavior or the outcome of the case, as this Court stated in *Guaranty*:

> . . . the intent of *Erie* was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.

326 U.S. at 109.

As noted, the twin aims of *Erie* are to avoid the inequitable administration of the laws and the inevitable forum shopping that will follow.[33] If non-application of the state rule encourages *either* of *Erie's* tests of substantiveness, then the

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[32] A rule or law defining the sufficiency of evidence could be considered both "procedural" and "substantive," – "procedural" in that it assigns decision making authority to the jury – "substantive" in that it defines the evidence sufficient to establish the claim.

[33] *Hanna*, 380 U.S. at 468.

state law applies. *Gasperini*, 518 U.S. at 428 (quoting *Hanna*, 380 U.S. at 468). This is true even if the state law appears on its face to be procedural.

As explained above, procedural rules concerning the burden of persuasion are so intertwined with the definition of the substantive right, that *Erie* requires that they apply in federal court. For the same reason, state laws that define the sufficiency of evidence to establish a state claim should apply in federal court, even if the issue arises in the context of a motion that can be characterized as purely "procedural." Indeed, as noted above, this Court has said as much in *Byrd*, 356 U.S. at 540 n.15.

The federal circuits, however, are divided on whether they should follow the state law defining the evidence sufficient to raise a jury question. Some hold that the sufficiency of evidence is a matter of state law.[34] Some hold it is a matter of federal law.[35] And some declare the issue is still unresolved.[36]

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[34] The Sixth and Eighth Circuits apply the state standard to the sufficiency of evidence in determining directed verdict motions: *See, e.g., American & Foreign Ins. Co. v. General Electric Co.*, 45 F.3d 135 (6th Cir. 1995); *City Nat'l Bank v. Unique Structures, Inc.*, 929 F.2d 1308, 1314 (8th Cir. 1991).

[35] The federal standard is applied in directed verdict motions in the Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits. *See, e.g., Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 99 (4th Cir. 1991); *Gross v. Black & Decker (U.S.), Inc.*, 695 F.2d 858, 864 (5th Cir. 1983); *Miller v. Republic Nat'l Life Ins. Co.*, 789 F.2d 1336, 1340 (9th Cir. 1986); *Zimmerman v. First Fed. Sav. & Loan Ass'n.*, 848 F.2d 1047, 1051 (10th Cir. 1988); *Jones v. Miles Labs.*, 887 F.2d 1576, 1578 (11th Cir. 1989).

[36] The Second Circuit has not yet resolved the question of whether a court sitting in diversity should evaluate challenges to the sufficiency of evidence under the standard of review prescribed by federal or state law. *See, e.g., Brady v. Chem. Constr. Corp.*, 740 F.2d 195, 202 n.7 (2d Cir. 1984).

Moreover, despite this Court's holding that the Rule 56 "standard" and "inquiry" "mirrors" that of a Rule 50 motion, and the primary difference between the two is timing, some circuits apply the federal standard for one and a state standard for the other.[37] For example, in the Sixth Circuit, the federal standard applies during pre-trial phases of litigation, such as in Rule 56 motions, but the state standard applies during the trial phase, such as in Rule 50 motions, and the post-trial phase, such as in Rule 59 motions.[38]

This Court's decisions in *Stoner* and *Byrd* should have all but laid this conflict to rest. In *Stoner,* this Court declared that when the state actually defines the quantum of evidence needed to present a jury issue on a cause of action the state definition applies. *Stoner v. New York Life Insurance Co.*, 311 U.S. 464 (1940). And later, in *Byrd* this Court endorsed *Stoner* for the proposition that "the federal court should follow the state rule defining the evidence sufficient to raise a jury question whether the state-created right was established." *Id.* at 540 n.15.

Thus, applying *Byrd* and *Stoner* here, the federal court is required to apply Oregon law because Oregon *has* defined the amount of evidence sufficient to raise a jury issue as to punitive damages.

Recently this Court affirmed *Byrd's*, and implicitly *Stoner's*, continued vitality in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). There it held that, at

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[37] "[The summary judgment] standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)." *Anderson,* 477 U.S. at 259. "[And the] summary judgment inquiry 'mirrors' that which applies in the context of a motion for directed verdict under Federal Rule of Civil Procedure 50(a)." *Id.*

[38] *See, e.g., J.C. Wyckoff & Assoc. v. Standard Fire Ins. Co.,* 936 F.2d 1474, 1482 (6th Cir. 1991).

least for federal actions brought under New York law, state law applies in determining the sufficiency of evidence under a Rule 59 motion brought at the trial level. *Id.* at 426. The instant case gives the Court an excellent opportunity to decide the issue squarely and directly so as to eliminate the divergent approaches taken by the various circuits.

(2). Oregon's law satisfies the *Erie* substantive law test

Here, the failure to follow Oregon's law at the federal level will result in fulfilling *Erie's* twin fears – the inequitable administration of laws and forum shopping.

If Oregon's law is not followed at the federal level, Oregon citizens and companies will be discriminated against. Oregon citizens and companies cannot remove state claims to federal court because they lack diversity. Thus, they are subject to liability for punitive damages so long as the plaintiff produces "any evidence" to support a *prima facie* case. On the other hand, because diversity exists for foreign corporations and non-citizens, they *are* able to remove state claims to federal court. Once there, they acquire the advantage, unavailable to Oregon citizens and companies in state court, of requiring the plaintiff to establish his or her *prima facie* case by the more onerous "clear and convincing" evidence standard.

The same rationale applies to injured plaintiffs. Those who have the added misfortune of being injured by an out-of-state citizen or foreign company have less of a chance of recovering than those who have been injured by an Oregon citizen or company because of the more onerous federal burden of establishing a State claim.

Applying a federal sufficiency standard under Rule 56 that is more stringent than that the under Oregon law will create a systematic bias against Oregon plaintiffs in federal court. After

all, it is plaintiffs, not defendants, who most often bear the burden of presenting a *prima facie* case, and with that, the extraordinary and heightened burdens of proofs, such as the "clear and convincing" standard.

In short, *Erie* requires that Oregon's sufficiency of evidence rule receives the benefit of any doubt about its "procedural" versus "substantive" character. Even if it appears to be both, under *Erie's* test it should be considered "substantive."

3. Applying Oregon's law does not run contrary to the Federal interests contained in the Seventh Amendment.

Having determined that Oregon's law is "substantive," the final question is whether the federal interests contained in the Seventh Amendment nevertheless require application of the federal standard.

a. There is little if any countervailing federal interest that would prevent a federal court from applying the Oregon sufficiency standard

This Court held in *Byrd*, that even if a state law is deemed "substantive," federal law may still apply if the federal interests outweigh the state interests. The countervailing federal interests that this Court had in mind was the federal interest addressed, "if not commanded," by the Seventh Amendment, which governs proceedings in federal court:

> An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence – if not the command – of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.

Byrd, 356 U.S. at 537.

The Seventh Amendment reads:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const., Amend. 7.

Byrd involved the Seventh Amendment's first clause – the "trial by jury" clause. *Byrd* was a personal injury action where the defendant asserted that the plaintiff was barred from recovering because he was considered an employee under the state's Workers Compensation Act. Were the case tried in state court, in accordance with the state law, the pivotal issues of fact would have been tried to a judge. But the *Byrd* Court held that failing to allow the jury to act as a fact-finder in federal court infringed on the Seventh Amendment's right to "trial by jury" by removing from the trial judge the power to submit the claim to the jury. Thus, despite a contrary state practice, the Seventh Amendment demanded that the plaintiff be given a jury trial in federal court.

This Court's ruling in *Byrd* does not, however, call for application of the federal approach in the instant case. *Byrd* specifically held that "defining the evidence sufficient to raise a jury question whether the state-created right was established" did not infringe upon Seventh Amendment.[39] It reasoned that such evidentiary standards do not remove from a federal trial judge the power to submit matters to a jury – the standards only aid the jury process by giving the judge appropriate guidelines

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[39] *Byrd*, 356 U.S. at 540 n. 15.

in making his or her jury-submission decision. Referring to the Court's decision in *Stoner v. New York Life Insurance Co.*, the *Byrd* Court stated:

> It was there held that the federal court should follow the state rule defining the evidence sufficient to raise a jury question whether the state-created right was established. But the state rule did not have the effect of nullifying the function of the federal judge to control a jury submission ....

Id. at 540 n.15.

As a practical matter, allowing a trial judge to incorporate Oregon's sufficiency of evidence standard will cause very little disruption of the federal civil jury trial process. The trial judge merely uses Oregon's "any evidence" standard in a summary judgment proceeding as opposed to a "clear and convincing" standard. In most cases the trial judge, having practiced in State court, is familiar with the State standard. And almost certainly, it is easier to apply in determining the sufficiency of evidence than the nebulous "clear and convincing" standard.[40]

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[40] Little guidance is given to the trial courts on how to apply the "clear and convincing" evidence standard to determine the sufficiency of evidence. *Anderson*, 477 U.S. 242(1986), instructs trial judges to "consider" applicable evidentiary standards, but the Court did not explain what that means:

> [H]ow does a judge assess how one-sided evidence is, or what a 'fair minded' jury could 'reasonably' decide? The Court provides conflicting clues to these mysteries, which I fear can lead only to increased confusion in the district and appellate courts.

Id. at 265 (Brennan, J., dissenting).

The difference between the evidence sufficient to submit a claim to the jury under the preponderance of the evidence quantum of proof but not

Federal courts can surely give effect to the substantive thrust of Oregon's definition of a *prima facie* case without any "untoward alteration of the federal scheme for the trial and decision of civil cases."[41]

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under the clear and convincing evidence quantum is difficult to imagine without weighing the evidence. As Justice Brennan noted:

> I simply cannot square the direction that the judge "is not himself to weigh the evidence" with the direction that the judge must also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quantity" to meet that "quantum." I would have thought that a determination of the "caliber and quantity," *i.e.*, the importance and value, of the evidence in light of the "quantum," *i.e.*, amount "required," could *only* be performed by weighing the evidence.

Id. at 266. (Brennan, J., dissenting) (emphasis in original.)

Referring to the trial judges who must apply the clear and convincing standard at the sufficiency of evidence level, Justice Brennan remarked:

> "[T]he mess we make is not, at least in the first instance, our own to deal with; it is the district courts and courts of appeal that must struggle to clean up after us."

Id. at 268. (Brennan, J., dissenting).

Justice Brennan was not alone. Justice Rhenquist also wrote a persuasive dissent, joined by Chief Justice Burger. In addition, Justice Scalia, who wrote the underlying opinion at the Court of Appeals, made similar observations. Several commentators also agree that trial judges cannot determine the "caliber and quality" of evidence without weighing the evidence. *See also* Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73, 85 (1990); Linda S. Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 Am.J. Trial Advoc. 433, 462 (1987); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.J. 95, 115-116 (1988).

[41] In *Gasperini*, Justice Ginsberg phrased the federal interest question as follows: "The dispositive question, therefore, is whether federal courts can

In summary, there is little if any countervailing federal interest that would displace or supersede the State interest.

b. The State of Oregon has a significant interest in applying her law

On the other hand, Oregon's interest in having her law applied is significant and compelling. *Byrd* held that great weight should be given to those state interests that are "bound up" in the "definition of state-created rights and obligations." *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 535 (1958). Here, defining what evidence suffices to create a jury issue on a state-created cause of action is, by definition, "bound up" in the "definition of state-created rights and obligations." A cause of action's elements are not abstractions. Rather, they are defined by – and barely distinguishable from – the evidence considered sufficient to prove them.

Indeed, to hold otherwise would seemingly run contrary to Fed. R. Evid. 302 which dictates that federal courts apply state law evidentiary presumptions to state claims:

> In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which state law supplies the rule of decision is determined in accordance with state law.

There is little difference between what evidence establishes an element of a claim and that which establishes the entire claim. If federal courts must follow Oregon law for the former, they should also follow Oregon law for the latter.

More importantly, the State of Oregon has historically

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give effect to the substantive thrust of [the state law] without untoward alteration of the federal scheme for the trial and decision of civil cases." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426 (1996).

placed great importance on the jury's right to act as the final arbiter on all issues of fact. *See* Or. Const., Article I, Section 17, Article VII (Amended) Section 3; *Van Lom v. Schneiderman*, 187 Or. 89, 93, 210 P.2d 461 (1949), *overruled in part by Oberg v. Honda Motor Co., Ltd.*, 320 Or. 544, 549, 888 P.2d 8, *cert. den.* 517 U.S. 1219 (1996). Assigning the fact-finding function as the exclusive province of the jury is at the heart of these Constitutional provisions. If Oregon holds that certain evidence establishes a *prima facie* showing and presents a fact issue for the jury, holding less would violate the right to jury trial guaranteed under the Oregon Constitution, Article I §17,[42] and the reexamination clause of the Oregon Constitution, Amended Article VII §3.[43]

Finally, unlike other states, the State of Oregon uses punitive damages as a means of policing culpable conduct, much like a fine. When a defendant is assessed punitive damages, sixty percent of the punitive damage award is owned by and paid directly to the State. ORS 18.540.

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[42] Oregon Constitution, Article I §17 provides:

> In all civil cases the right of Trial by Jury shall remain inviolate.

[43] Oregon Constitution, Amended Article VII §3 provides in relevant part:

> In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.

While the present issue involves a type of pre-examination, not a reexamination of the jury's work, it should be clear that the court cannot prevent the jury from deciding a fact question on which there is evidence without violating the spirit of Amended Article VII §3 and the letter of Article I §17. *Lakin v. Senco Products, Inc.*, 329 Or. 62, 69-70, 987 P.2d 463 (1999).

Given the absence of a federal interest, and Oregon's significant state interest, Oregon's standard should apply.

CONCLUSION

In Oregon, a plaintiff's *prima facie* case does not disappear merely because a defendant removes the case to federal court. *Erie* and *Byrd* teach that we simply exchange courtrooms, not law, in deciding diversity cases.

Determining whether the plaintiff has presented sufficient evidence is in effect telling the plaintiff whether he or she has a case or not. To say a plaintiff has a case in state court but not in federal court will lead to serious inequities.

When a federal court is sitting in diversity and considering a summary judgment motion, Oregon's law defining what evidence suffices to raise a jury question on punitive damages must apply. The petition for writ of certiorari should be granted.

Respectfully Submitted,

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February 2003